No. 91-184

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT LEE WATKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge properly denied petitioner's recusal motions on the ground that communications between judges regarding the administration of the district court are judicial in nature and do not demonstrate personal bias.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A40-A42) is unreported, but the judgment is noted at 921 F.2d 285 (Table). The memorandum order of the district court (Pet. App. A34-A39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1990. A petition for rehearing was denied on April 4, 1991. Pet. App. A44-A45. The petition for a writ of certiorari was filed on July 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on one count of inducing a witness to testify falsely, in violation of 18 U.S.C. 1623. The district court sentenced petitioner to a five-year term of imprisonment and a $50,000 fine. The court of appeals affirmed.

1. Petitioner was a named defendant and a representative for other defendants (known generally as the Carter heirs) in *Tarbutton* v. *The Carter Place*, 641 F. Supp. 521 (M.D. Ga. 1986), an action to quiet title to approximately 585 acres of land in Washington County, Georgia. The Carter heirs claimed that Esther Scott, now known as Esther Scott Hinton (a predecessor in interest to the Carter heirs), had not in fact signed a recorded deed dated January 31, 1938, purporting to convey an interest in the property in question from Scott to B.J. Tarbutton. The Carter heirs supported their claim with testimony by Scott, stating that she did not sign the deed, as well as testimony at a deposition by one Charles E. Williams of Taylor, Michigan, stating that he was the notary public of that name who signed the deed as witness in 1938, that he did so in Sandersville, Georgia, at the behest of B.J. Tarbutton, that he was not a notary public at the time, and that neither Scott's signature nor the signature of the other witness, Maude Williams, was on the document at the time he signed it. 641 F. Supp. at 524-525, 528-529.

The district court found Williams' testimony "incredible" because Williams did not recall anything about Sandersville, Georgia, other than signing the Tarbutton deed as a teenager; because school records showed Williams was enrolled in Kentucky schools,

not Georgia schools, at the time the deed was signed; and because the plaintiffs produced evidence that a deceased attorney named Charles E. Williams was a notary public who had been married to a Maude Williams. *Id.* at 528-529.

Because the trial judge (Judge Fitzpatrick) believed that petitioner might have aided and abetted perjury in securing Williams' testimony, he consulted with Chief Judge Owens regarding what to do. The two judges agreed that the proper response was for Judge Fitzpatrick to refer the matter to the appropriate authorities and to stay the civil case. See Pet. App. A42.[1]

2. After a grand jury indicted petitioner for inducing Williams' false testimony in the *Tarbutton* deposition, the criminal case was assigned to Chief Judge Owens. On October 27, 1989, petitioner filed in the district court a pretrial motion seeking the recusal and disqualification of Judge Owens under 28 U.S.C. 455(a) on three grounds. The recusal claim arose from three incidents that occurred in civil cases involving rights to kaolin, a white clay used in manufacturing ceramics and other products. In those cases, as in the *Tarbutton* matter, petitioner acted as an investigator and representative for persons claiming interests in land that contained kaolin. First, petitioner claimed that in a June 30, 1989, hearing Judge Owens stated that he was "familiar with the circumstances" that had caused petitioner's indictment. See Oct. 27, 1989, Mot. for Recusal 1.[2] Second,

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[1] The court ultimately granted summary judgment against the Carter heirs. 641 F. Supp. at 535-536.

[2] Petitioner also unsuccessfully sought Judge Owens' recusal in a related civil case, *Cheeves* v. *Southern Clays, Inc.*, 726 F. Supp. 1579 (M.D. Ga. 1990). Judge Owens pointed

petitioner cited a letter dated July 11, 1989, from Judge Fitzpatrick to petitioner's counsel, Franklin Nix. In the letter, Judge Fitzpatrick informed Nix that he was recusing himself from cases involving petitioner because he was biased against petitioner and would not believe petitioner under oath. Judge Fitzpatrick stated that he understood that Judge Elliott would handle the civil case. Judge Fitzpatrick indicated in the letter that Judge Owens, as chief judge of the district court, was being sent a courtesy copy of the letter. *Id.* at 2. Petitioner's final basis for recusal was Judge Owens' alleged statement in a September 27, 1989, civil hearing that "[petitioner's] situation was unique; that [petitioner] had been assigned an interest in [other land actions similar to the *Tarbutton* case]; and that he was either a party or a virtual party to the cases." *Id.* at 3.

Judge Owens denied the recusal motion at a November 1, 1989, hearing. See Pet. App. A5-A9. He explained that petitioner had been indirectly involved in a number of civil cases in his court and that accordingly he was familiar with petitioner's activities in those cases. He also acknowledged his awareness of Judge Fitzpatrick's recusal and the July 11 letter, but concluded: "I know of nothing that would suggest to anybody that I have any personal bias or prejudice." *Id.* at 7a.

After petitioner had been convicted, his counsel filed a second recusal motion on March 19, 1990, relying on 28 U.S.C. 144 and 455(a). In addition to the matters described above, petitioner relied on Judge Fitzpatrick's statement in a September 29, 1987, hear-

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out that he knew about petitioner's indictment two months before the civil hearing because the criminal case had been assigned to him at that time. *Id.* at 1582.

ing in a kaolin case involving petitioner that after a "conference with another judge" he thought a stay of proceedings in that case would be appropriate because of "something pending in a related suit." Petitioner alleged that the other judge was Judge Owens, and that Judge Owens' failure to disclose the conference demonstrated that he was biased against petitioner. See Mar. 19, 1990, Mot. for Recusal 14-15; Pet. App. A2.

Judge Owens denied the motion. Pet. App. A34-A39. He noted that recusal would be proper only if petitioner could show some personal bias, and that petitioner's filings cited only prior rulings of the court and "comments in other cases in which defendant has an interest." *Id.* at A35. He also rejected petitioner's argument that his discussions with Judge Fitzpatrick demonstrated personal bias. He reasoned (*id.* at A35-A37):

> "Judicial activity," for purposes of determining whether alleged bias of court required for recusal is extrajudicial, includes participation in and statements made at in-chambers conferences. * * * [I]nsofar as [petitioner's] affidavit in support of recusal relies on statements made by this court during in-chambers conferences, it is legally insufficient.

Finally, Judge Owens rejected (*id.* at A37) petitioner's contention that Judge Owens was biased because of his receipt of Judge Fitzpatrick's letter of recusal. Judge Owens stated that he had received the letter "as part of his judicial administrative function," and that any bias by Judge Fitzpatrick against petitioner could not be imputed to Judge Owens. *Ibid.*

3. The court of appeals affirmed in an unpublished per curiam opinion (Pet. App. A40-A42). First, it rejected petitioner's reliance on Judge Fitzpatrick's

recusal letter, both because Judge Owens received the letter in his capacity as chief judge of the district court responsible for reassigning the case, and because the letter did not demonstrate bias on Judge Owens' part. *Id.* at A41. As to petitioner's claim that Judge Owens was biased because he had conferred with Judge Fitzpatrick, the court of appeals concluded that the most that could be said was that a district court judge conferred with his chief judge concerning the appropriate steps to take when he believed a party had aided and abetted perjury in his court. As in the case of the letter, the court held, the consultation incident could not form the basis for recusal because it was entirely judicial, and because it showed no bias on the part of Judge Owens. *Id.* at A42.

ARGUMENT

1. Petitioner first contends (Pet. 19-25) that Judge Owens' failure to recuse himself was contrary to applicable federal statutes. Federal law contains two statutes that require disqualification of a judge for bias or prejudice. Under the first of these, 28 U.S.C. 144, a party to a proceeding may file an affidavit alleging that the district court judge assigned to the matter "has a personal bias or prejudice either against him or in favor of any adverse party." If the affidavit is timely and "sufficient," the judge may not proceed further in the case, and another judge is assigned to hear the proceeding. To be sufficient, the affidavit must allege personal rather than judicial bias, that is, bias that arose from the judge's background and associations, not from his experience as a judge. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Easley* v. *University of Michigan Bd. of Regents*, 853 F.2d 1351, 1356 (6th Cir. 1988).

Moreover, the affidavit must allege actual bias, not merely the appearance of bias. See, *e.g.*, *In re Faulkner*, 856 F.2d 716, 720 n.6 (5th Cir. 1988).

The second statute, 28 U.S.C. 455, is self-executing: if its provisions apply, the judge must recuse himself whether or not a party files a request that he do so. See *Easley* v. *University of Michigan Bd. of Regents*, 853 F.2d at 1356. Subsection (a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Unlike Section 144, Section 455(a) establishes an objective standard: the question is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. See, *e.g.*, *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860-861 (1988).[3] Subsection (b) then lists specific circumstances in which a judge is required to recuse himself; the only one of arguable relevance here is set forth in subsection (b)(1), which requires recusal "[w]here [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Like Section 144, this Section establishes a subjective standard and applies only if the bias is "personal" or "extrajudicial" in nature; "what a judge learns or comes to believe in his judicial capacity 'is a proper basis for judicial observations, and the use of such information is not the kind of matter that

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[3] See also *United States* v. *Devine*, 934 F.2d 1325, 1348 (5th Cir. 1991); *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983).

results in disqualification.' " *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988), cert. denied, 490 U.S. 1102 (1989); see *United States* v. *Coven*, 662 F.2d 162, 167-168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3542, at 556-576 (2d ed. 1984).

Petitioner has failed to demonstrate any personal bias on the part of Judge Owens sufficient to justify recusal under 28 U.S.C. 144 or 455(b)(1). He does not cite a single statement by Judge Owens that justifies a belief that Judge Owens has a personal animus against petitioner. Nor is there anything in the record to suggest that Judge Owens has been misleading or less than forthcoming regarding his conversations with Judge Fitzpatrick. Whatever view Judge Owens may have acquired in his conversations with Judge Fitzpatrick as to petitioner's reputation for veracity was received in his capacity as chief judge of the district court. There is no need for this Court to review the court of appeals' entirely reasonable conclusion that the receipt of this information need not be presumed to create the kind of bias that requires recusal under Section 144 or 455(b).

Petitioner fares no better in his attempt to establish an objective appearance of partiality within the meaning of 28 U.S.C. 455(a). Judge Owens learned of petitioner's situation only because, as chief judge of the district court, he was responsible for assigning cases within the district. There is no indication that he learned anything more than that petitioner might have aided and abetted a witness's perjury in Judge Fitzpatrick's courtroom and that Judge Fitzpatrick recused himself from one of petitioner's civil cases on the ground of bias. This is nothing more than

Judge Owens learned from the indictment in this case and the facts of Judge Fitzpatrick's recusal. No reasonable person with knowledge of all the facts would conclude that Judge Owens' impartiality might reasonably be questioned on these grounds.[4]

Petitioner's suggestion (Pet. 20-21) that the decision below conflicts with numerous decisions of other circuits is incorrect. As petitioner himself acknowledges (Pet. 22), "none of these decisions have addressed the disqualifying effects of *ex parte* communications between fellow judges." Of the three cases on which petitioner relies most heavily, the first, *In re Paradyne Corp.*, 803 F.2d 604 (11th Cir. 1986), involved a district court's plan to interview defendants, counsel, and witnesses *ex parte* and *in camera* to determine whether there was a conflict in the case; the court of appeals held that the district court should have followed established procedure and held an examination in open court to question defendants as to the existence of conflicts of interest. The second, *Price Bros. Co.* v. *Philadelphia Gear Corp.*, 629 F.2d 444

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[4] In any event, petitioner would not necessarily be entitled to a new trial even if petitioner were correct that Judge Fitzpatrick's communication with Judge Owens created an appearance of partiality under 28 U.S.C. 455(a). As this Court explained in *Liljeberg*, 486 U.S. at 864, "in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." In this case, petitioner has failed to show any way that Judge Owens' alleged appearance of partiality affected the proceedings; indeed, the only other issue raised on appeal was a legal question as to the materiality of the false testimony, on which the court of appeals found the district court's ruling to be clearly correct. See note 5, *infra*.

(6th Cir. 1980), involved ex parte observations of evidence by a judge's law clerk. The third, *United States* v. *Earley*, 746 F.2d 412 (8th Cir. 1984), cert. denied, 472 U.S. 1010 (1985), involved papers provided to a court by a party who failed to serve counsel for the other party.

2. Petitioner contends (Pet. 25-28) that Judge Owens' conduct violated Canon 3A(4) of the Code of Judicial Conduct, 69 F.R.D. 273 (1975). Canon 3A(4) bars ex parte communications regarding a pending or impending proceeding. 69 F.R.D. at 275. The commentary explains, however, that the Canon "does not preclude a judge from consulting with other judges, or with court personnel whose function it is to aid the judge in carrying out his adjudicative responsibilities." *Id.* at 276. Although petitioner quotes (Pet. 8) the reporter's notes to this Canon as suggesting that "[a] judge who has * * * given advice about the issues in a proceeding has put his impartiality in jeopardy," the quoted language is inapposite here. As the court of appeals explained, see Pet. App. A42, the communications between Judge Owens and Judge Fitzpatrick related not to the merits of any civil or criminal case, but to the procedures to be followed in responding to a party's possible attempt to present false evidence. Petitioner does not cite, and we are not aware of, any case that interprets the Canon in a way that would cast doubt on the actions of the judges in this case. Rather, because of Judge Owens' administrative responsibilities, his role was the legitimate one of "court personnel whose function it is to aid the judge [here Judge Fitzpatrick] to carry out his adjudicative responsibilities." Thus, Judge Owens did not "giv[e] advice about the issues in a proceeding" in the sense intended by the reporter. See Canon

3B(1) of the Code of Judicial Conduct, 69 F.R.D. at 276 ("A judge should diligently discharge his administrative responsibilities * * * and facilitate the performance of the administrative responsibilities of other judges and court officials."); *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1145 (6th Cir. 1990) (en banc) (judge who recuses himself is permitted to perform duties necessary to transfer case to another judge); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1024-1025 (9th Cir. 1981) ("[W]e refuse to construe the word 'proceeding' [in 28 U.S.C. 455(b)(1)] to include the performance of ministerial duties such as assigning a case to another judge."), aff'd for absence of a quorum, 459 U.S. 1190 (1983).[5]

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[5] Petitioner also relies (Pet. 8, 9, 15, 17) on Canon 3C of the Code of Judicial Conduct. The obligations created by that provision are incorporated in 28 U.S.C. 455(b)(1) by the use of the reference to "personal" bias. See *United States* v. *Coven*, 662 F.2d 162, 167-168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982). For the reasons stated above, petitioner has not established that Judge Owens violated that provision.

Petitioner also lists as an issue (Pet. iv) the question whether Williams' false testimony was material, but he presents no argument on the merits of that contention, which in any case is meritless. The test for determining the materiality of testimony is whether the testimony "was capable of influencing the tribunal on the issue before it." *United States* v. *Cuesta*, 597 F.2d 903, 921 (5th Cir.), cert. denied, 444 U.S. 964 (1979). The test applies even if the testimony "[is] not ultimately dispositive of the issue" before the court. *United States* v. *Molinares*, 700 F.2d 647, 654 (11th Cir. 1983). The court of appeals correctly held that petitioner's contention that the testimony was not material was "frivolous," Pet. App. A41. The main issue in *Tarbutton* was the claim of title to property established in part by the Esther Scott deed. The perjured testimony consisted of false statements as to the validity of the Esther Scott signature, which, if believed, could have led to invalidation of the deed. The fact that the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

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district court decided under the doctrine of laches that Scott could not challenge her signtaure 45 years after the document was signed does not lessen the materiality of the false testimony presented by Williams.

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